CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

October Term, 1917.

No. 536.

THE UNITED STATES OF AMERICA AND THOMAS THOMAS

vs.

WOOTAN.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Filed, 1917 A. D.

CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 586.

THE UNITED STATES OF AMERICA AND THOMAS THOMAS

vs.

WOO JAN.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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1 United States Circuit Court of Appeals, Sixth Circuit.

UNITED STATES OF AMERICA, AND THOMAS THOMAS, appellants, *vs.* WOO JAN, APPELLEE.	No. 3025.

Appeal from the District Court of the United States for the Eastern District of Kentucky.

Submitted June 7, 1917. Certified June 30, 1917.

Before Warrington, Knappen, and Denison, Circuit Judges.

PER CURIAM: In the case of Woo Shing v. United States, No. 2882, Judge Clarke (now Mr. Justice Clarke) decided, in the court below, that the Secretary of Labor had jurisdiction to deport a Chinaman on the ground alleged against Woo Shing (226 Fed. 141). Shortly thereafter, Judge Cochran, in a District Court of Kentucky, held, in an elaborate opinion (Woo Jan v. United States, 228 Fed. 927), that such jurisdiction was vested exclusively in the courts. When the Woo Shing case came on for argument, it was learned that the Woo Jan case was in the course of appeal to this court, and, accordingly, we withheld decision in the former until the latter case should be argued. This argument has now been presented.

The question has been involved and decided, in the same way as it was by Judge Clarke, by the Circuit Courts of Appeals for the Eighth Circuit (Lo Pong v. Dunn, 235 Fed. 510), and for the Third Circuit (Sibray v. United States, 227 Fed. 1). In both cases, certiorari was refused (242 U. S. 644, 241 U. S. 657); but the briefs filed in the Supreme Court show that in neither case was this question presented to that court. On the other hand, Judge
2 Cochran's opinion has been approved and followed by the Circuit Courts of Appeals for the Seventh Circuit (United States v. Lem Him, 239 Fed. 1023), and for the Fifth Circuit (Lee Wong Hin v. Mayo, 240 Fed. 368). The matter seems to us proper for certification.

In the Woo Shing case the petition for habeas corpus was not filed until the order of deportation had been made, while in the Woo Jan case the petition therefor was filed as soon as Woo Jan was taken upon the warrant of arrest; but we do not see that this makes any difference. In order that the expense of taking up two cases may be avoided, we have decided to certify the Woo Jan case and to

hold the Wo Shing case upon our calendar. Counsel in the Woo Shing case will be notified, and we assume that they will be allowed to participate in the hearing in the Supreme Court as if their case also had been certified. Accordingly, we make the following findings of fact and request for instructions:

Woo Jan filed, in the District Court for the Eastern District of Kentucky, his petition for habeas corpus. He set up therein that he was in the custody of the immigrant inspector by virtue of a warrant issued by the Secretary of Labor, which warrant was as follows:

"To J. A. Fluckey, Inspector in Charge, Cleveland, Ohio, or to any immigrant inspector in the service of the United States:

"Whereas from evidence submitted to me, it appears that the alien Woo Mon, alias Woo Jan, who landed at the port of San Francisco, Cal., ex SS 'Nippon Maru,' on the 2nd day of May, 1913, has been found in the United States in violation of the act of Congress approved February 20, 1907, amended by the act approved March 26, 1910, for the following among other reasons:

"That the said alien is unlawfully within the United States in that he has been found therein in violation of the Chinese exclusion laws, and is, therefore, subject to deportation under the provision of section 21 of the above mentioned act.

"I, J. B. Densmore, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with the law. * * *

"Witness my hand and seal this first day of April, 1914.

"(Signed) J. B. DENSMORE,
"*Secretary of Labor.*"

3 Woo Jan's petition further alleged that he was 57 years old; was born in China, and since 1877 had been a resident of, and a domiciled merchant in, the United States; that during this time he had done no manual labor, excepting what was incidental to his business as a merchant; that in 1894 he was registered as a merchant by the collector of internal revenue at Lexington, Kentucky, and given a registration certificate, which he still has; that for many years he has been a resident of Ashland, Kentucky; that during the period of his residence in the United States he has returned to China upon three occasions, and each time his status as a resident merchant had been investigated by the United States authorities and established; that January 29, 1912, he made an application at San Francisco for a preinvestigation of his status as a lawfully domiciled merchant preparatory for departing to China upon a temporary visit; that on February 28, 1912, the Chinese inspector, upon an investigation, found that Woo Jan was a merchant, as he claimed, and

recommended favorably and that thereupon there was issued to him a returning merchant's certificate for his use according to law on re-entering; that he departed for China in March, 1912, and remained there upon a temporary visit until he returned to the United States upon the second day of May, 1913, upon which latter date he and his wife were admitted by the immigration and customs officers at San Francisco; and that since this date he has been continually engaged in the prosecution of his business as a resident merchant in the United States. He further sets up that the provisions of the immigration act of February, 1907, have no application to his case and that the proceedings had thereunder with a view to deporting him were without authority of law and void for the reason, among others, that the so-called warrant of arrest sets forth no basis for the proceedings against him except that he is unlawfully in the United States in that "he has been found there in violation of the Chinese exclusion laws." The petition then expressly alleged that §43 of the immigration act had the effect to continue in full force those provisions of the Chinese exclusion act which gave jurisdiction for deportation only to the United States commissioner and which gave to the Chinaman the right of appeal to the United States District Court.

The petitioner thereupon summarized his position as follows:

"Your petitioner shows unto your honor that there is no authority of law for the issuance of the said warrant, 'Exhibit A,' in
4 that it affirmatively appears that the entry of your petitioner into the United States was a lawful entry and approved by the immigration officers at the port of entry, and that it is not charged in said warrant that your petitioner is in the United States in violation of any of the provisions of the immigration act, but that he is in the United States only in violation of the Chinese exclusion act, and your petitioner alleges that whether or not he is deportable under the provisions of the Chinese exclusion act can not lawfully be determined by immigration officials in a deportation proceeding after an acknowledged legal entry into the United States, but that such deportation proceeding, if any, must be instituted and proceeded with as provided by the Chinese exclusion act—that is, upon a sworn complaint before a United States commissioner or district judge."

Upon this petition, a writ was issued, and when the matter came on to be heard the United States district attorney filed a general demurrer to the petition. The district judge overruled the demurrer; the United States declined to answer the petition or plead further; and it was thereupon ordered that Woo Jan be discharged. The United States immigrant inspector joined in this appeal.

Upon these facts we desire the instruction of the Supreme Court for our proper decision of the following questions of law arising thereon (a, in the abstract; b, concretely):

(a) Has the Secretary of Labor, acting within three years from the last entry, jurisdiction to arrest and deport a Chinese alien upon

the sole ground that he is found in this country in violation of the Chinese exclusion act?

(b) Are the facts stated in Woo Jan's petition and admitted by demurrer inconsistent with any jurisdiction in the Department of Labor to cause his arrest and deportation?

J. W. WARRINGTON,
L. E. KNAPPEN,
A. C. DENISON,
Judges of the Circuit Court of Appeals for the Sixth Circuit.

Attest:
W. C. COCHRAN, *Clerk.*

5 United States Circuit Court of Appeals for the Sixth Circuit.

I, William C. Cochran, clerk of the above-named court, do hereby certify that the foregoing certificate in the case of United States of America vs. Woo Jan, No. 3025, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Sixth Circuit, at my office in the city of Cincinnati, Ohio, this nineteenth day of July, A. D. 1917.

WILLIAM C. COCHRAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(Indorsement on cover:) File No. 26,053. U. S. Circuit Court of Appeals, 6th Circuit. Term No. 586. The United States of America and Thomas Thomas vs. Woo Jan. (Certificate.) Filed July 21st, 1917. File No. 26,053.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE UNITED STATES OF AMERICA AND Thomas Thomas
v.
WOO JAN. } No. 586.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

Pursuant to a warrant issued by the Secretary of Labor upon evidence submitted to him and under the provisions of the Immigration Act of February 20, 1907, as amended by the act of March 26, 1910, Woo Jan, a domiciled Chinese merchant of the United States, was arrested for the purpose of being given a hearing before the immigration authorities to enable him to show cause why he should not be deported on the ground that he had been found in the United States in violation of the Chinese Exclusion Laws,

and therefore subject to deportation under section 21 of the Immigration Act.

Thereupon Woo Jan filed in the District Court of the United States for the Eastern District of Kentucky his petition for a writ of *habeas corpus* on the ground *inter alia* that, after legal entry into the United States of a Chinese merchant the question of whether or not he is deportable under the provisions of the Chinese Exclusion Laws is one which can not lawfully be determined by immigration officials, but is one that must be determined by a United States commissioner or district judge in accordance with the provisions of the Chinese Exclusion Laws.

The writ issued, and when the case came on to be heard the United States filed a general demurrer to the petition, which was overruled, and, the United States declining to answer or plead further, Woo Jan was ordered discharged.

An appeal was taken to the Circuit Court of Appeals for the Sixth Circuit, which certified to this court the following questions:

A.

(In the abstract.)

"Has the Secretary of Labor, acting within three years from the last entry, jurisdiction to arrest and deport a Chinese alien upon the sole ground that he is found in this country in violation of the Chinese exclusion act?"

B.

(Concretely.)

"Are the facts stated in Woo Jan's petition and admitted by demurrer inconsistent with any jurisdiction in the Department of Labor to cause his arrest and deportation?"

The questions are of importance to the Department of Labor in the administration of the Immigration and Chinese Exclusion Laws, and as the answer of this court will govern that department in future administration of those laws an early determination thereof by this court is desirable.

Opposing counsel concur.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1917.

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CASES CITED.

In the Supreme Court of the United States

OCTOBER TERM, 1917.

THE UNITED STATES AND THOMAS THOMAS, Appellants, *v.* WOO JAN, Appellee. } No. 586.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE APPELLANTS.

STATEMENT.

The appellee, a Chinese alien, was arrested under a warrant issued by the Secretary of Labor, charging said alien with being in the United States in violation of the Chinese-exclusion laws. Appellee thereupon sued out a writ of habeas corpus, alleging (1) that he was lawfully here as a merchant, and (2) that the Secretary, acting under the immigration act of February 20, 1907 (34 Stat. 898), had no jurisdiction to arrest and deport Chinese aliens alleged to be here in violation of the Chinese-exclusion laws. A demurrer to the petition was filed and overruled. The United States refused to answer, or plead further, and a judg-

ment was entered ordering the discharge of appellee. An appeal was perfected to the United States Circuit Court of Appeals, and that court, on account of conflict of decisions, certified to this court for solution, the following two questions (R. pp. 3 and 4):

> 1. Has the Secretary of Labor, acting within three years from the last entry, jurisdiction to arrest and deport a Chinese alien upon the sole ground that he is found in this country in violation of the Chinese exclusion act?
>
> 2. Are the facts stated in Woo Jan's petition and admitted by demurrer inconsistent with any jurisdiction in the Department of Labor to cause his arrest and deportation?

The solution of these questions rests solely upon the interpretation to be placed upon sections 21 and 43 of the immigration act of February 20, 1907 (34 Stat. 898), pertinent portions of which are as follows:

> SEC. 21. That in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act, *or of any law of the United States*, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this Act, and a failure or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Secretary of Labor to take on board, guard safely, and return to the country

whence he came any alien ordered to be deported under the provisions of this Act shall be punished by the imposition of the penalties prescribed in section nineteen of this Act: * * *

SEC. 43. * * * *Provided*, That this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, nor to repeal, alter, or amend section six, chapter four hundred and fifty-three, third session Fifty-eighth Congress, approved February sixth, nineteen hundred and five, or, prior to January first, nineteen hundred and nine, section one of the Act approved August second, eighteen hundred and eighty-two, entitled "An Act to regulate the carriage of passengers by sea."

ARGUMENT.

Section 21 authorizes the Secretary of Labor to arrest and deport aliens found here in violation of the Chinese-exclusion laws.

The argument usually directed against the power of the Secretary in cases of which the one at bar is typical, rests largely, if not wholly, upon what the Government conceives to be a mistaken interpretation of the scope of section 43 of the immigration act, *supra*, and *United States* v. *Wong You*, 223 U. S. 67. The treatment of these in their inverse order seems the logical course, for if the Wong You decision, upon analysis can be shown to be controlling, the scope of section 43 of the immigration act is no longer open to challenge.

A. THE WONG YOU DECISION.

It has been asserted, in effect, that in the Wong You decision, *supra*, this court intended to hold that the power of the Secretary to arrest and deport was limited to those Chinese aliens shown to have entered or to be here, in violation of the immigration laws; that if the decision be construed as authorizing the Secretary to arrest and deport those here in violation only of the Chinese-exclusion laws, such construction would run counter to the prohibition contained in section 43 of the immigration act, *supra*, which forbids that act being so interpreted as to "repeal, alter, or amend" the Chinese legislation.

It is true that in the Wong You case the Chinaman was charged with having entered the country in violation of the immigration act, but the tenor of the opinion falls short of disclosing that such fact was the essential premise upon which the court's conclusion was rested. The following excerpt discloses the reasoning of the court (223 U. S. 67, 69):

> * * * They were arrested *in transitu* and ordered by the Secretary of Commerce and Labor to be deported. (§§ 20, 21.) But as it transpired in the evidence that they were laborers, the Circuit Court of Appeals held that they could be dealt with only under the Chinese-exclusion acts of earlier date. Those acts make it unlawful for any Chinese laborer to come from any foreign place into the United States, or, having so come, to remain there, and provide a different procedure for removing them. Hence it was concluded that

such persons were tacitly excepted from the general provisions of the immigration act, although broad enough to include them and although of later date.

We are of opinion that the Circuit Court of Appeals made a mistaken use of its principles of interpretation. By the language of the act any alien that enters the country unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. It seems to us unwarranted to except the Chinese from this liability because there is an earlier more cumbrous proceeding which this partially overlaps. The existence of the earlier laws only indicates the special solicitude of the Government to limit the entrance of Chinese. It is the very reverse of a reason for denying to the Government a better remedy against them alone of all the world, now that one has been created in general terms. To allow the immigration act its literal effect does not repeal, alter, or amend the laws relating to the Chinese, as it is provided that it shall not, in section 43. The present act does not contain the clause found in the previous immigration act of March 3, 1893, 27 Stat. 569, c. 206, that it shall not apply to Chinese persons, and, on the other hand, as it requires deportation to the trans-Pacific ports from which such aliens embarked for the United States, § 35, it is rather hard to say that it has not the Chinese specially in mind.

Is not the dominant note of the opinion, that "any alien that enters the country *unlawfully* may

be summarily deported by order of the Secretary," and not merely an alien who enters in violation of the immigration act? Certainly no emphasis was laid upon the particular law violated by the entry. To now assert that the particular law violated constitutes the determinative factor because of the provisions of section 43 of the immigration law, is to seek to destroy the principle upon which the case must rest. Upon what legal theory can it be established that the immigration act in imposing restrictions upon the entry and residence here of Chinese aliens, additional to those defined in the Chinese-exclusion laws, does not thereby "alter or amend" these latter laws, but that the immigration act in providing an additional remedy for deporting a Chinese alien here in violation of the Chinese-exclusion laws does "alter or amend" those laws?

The failure to find a distinguishing factor which would permit upholding the Secretary's power in one case, and denying it in the other, has driven many lower courts to construe the Wong You decision as necessarily resting upon the principle that a Chinese alien here in violation of *any* law of the United States, including the Chinese exclusion laws, "may be summarily ordered deported by the Secretary."

B. LOWER COURT CASES CONSTRUING THE WONG YOU DECISION TO COVER CASES LIKE THAT AT BAR.

Mr. Justice Clarke of this court passed upon the point while sitting as United States district judge in *Ex parte Woo Shing*, 226 Fed. 141. In that case

the Chinaman was ordered deported by the Secretary upon the ground that he was found here in violation of the Chinese-exclusion laws. In upholding the power of the Secretary, Justice Clarke said:

> The case of *United States* v. *Wong You*, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354, seems to me decisive of this case. In that case certain Chinamen entered the United States surreptitiously in a manner prohibited by the immigration act of February 20, 1907, but the court says it transpired in the evidence that they were laborers, and for that reason the Circuit Court of Appeals held that they could be dealt with only under the Chinese exclusion act of earlier date. The conclusion of the Circuit Court of Appeals is declared to have been a mistaken one, and its decision is reversed; the Supreme Court saying that by the language of the act any alien that enters the country unlawfully may be summarily deported by order of the Secretary of Labor at any time within three years, and then continues:
>
> "It seems to us unwarranted to except the Chinese from this liability because there is an earlier more cumbrous proceeding which this partially overlaps. The existence of the earlier law only indicates the special solicitude of the Government to limit the entrance of Chinese. It is the very reverse of a reason for denying to the Government a better remedy against them alone of all the world, now that one has been created in general terms. To allow the immigration act its literal effect does not re-

peal, alter, or amend the laws relating to the Chinese, as it is provided that it shall not in section 43."

In this case decided by the Supreme Court the aliens entered the country surreptitiously, not at a prescribed port of entry, and in the case at bar the alien entered at a proper port of entry, but by fraudulent representations. I can not bring myself to think that the opinion of the Supreme Court proceeds upon the narrow distinction which is pressed upon my attention in this case. No justice of that Court uses language with more precision than does Justice Holmes, and there is no intimation that the fact is that, when the charge is based upon violation of the Chinese exclusion act, the remedy shall be different from what it is when it charges violation of the immigration act, if the proceeding is commenced within three years after the landing or entry into this country of the alien.

Precisely the same claim was made in the Supreme Court case as is made here—that Chinese immigrants are subject to the procedure prescribed in the Chinese exclusion act and not to that prescribed by the immigration act; the only difference being that the ground of the claimed right to exclude the alien is found in the one case in the immigration act and in the other in the Chinese exclusion act. Discussing this question the Supreme Court uses the expression above quoted:

"It seems to us unwarranted to except the Chinese from this liability because there is an earlier more cumbrous proceeding which this partially overlaps."

The Circuit Court of Appeals for the Third Circuit thus expresses its view in *Sibray* v. *United States*, 227 Fed. 1, 5:

> On January 19, 1915, the alien (who had come to Pittsburgh several months before) was taken into custody on the charge of being a laborer unlawfully in the United States. This proceeding, which was before a United States commissioner and was under the exclusion acts, was abandoned on February 2, the Federal authorities having meanwhile obtained a warrant from the Department of Labor under sections 20 and 21 of the immigration act of 1907. This change of procedure was within the department's right. Both remedies were available, as the Supreme Court decided in *U. S.* v. *Wong You*, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354; that case holding that the immigration act applies to Chinese laborers illegally coming to this country notwithstanding the special statutes relating to their exclusion.

In *Lo Pong* v. *Dunn*, 235 Fed. 510, in which the Chinaman was ordered deported because found here in violation of the Chinese-exclusion laws, the Circuit Court of Appeals for the Eighth Circuit said:

> By section 20 of the immigration act of February 20, 1907, c. 1134, 34 Stat. 904 (Comp. St. 1913, § 4269), as amended by the act of March 4, 1913, c. 141, 37 Stat. 736, "any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of

Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry to the United States." The warrant and order of deportation charged appellant with being found in the United States in violation of section 6 of the Chinese exclusion act, as amended by act July 5, 1884, having secured admission on a fraudulently procured certificate. The gravamen of this charge was a fraudulent entry into the United States, and hence appellant, though a Chinese person, was subject to the action of the Secretary of Labor. *United States* v. *Wong You*, 223 U. S. 67, 69, 32 Sup. Ct. 195, 56 L. Ed. 354; *Williams* v. *United States*, 186 Fed. 479, 480, 108 C. C. A. 457; *Ex parte Greaves* (D. C.), 222 Fed. 157, 158.

See also:

Ex parte Lam Pui, 217 Fed. 456, 460.
Lui Hip Chin v. *Plummer*, 238 Fed. 763.
United States v. *Sisson*, 222 Fed. 693.

C. CASES CONTRA.

Examination will disclose that the cases which delimit the Wong You decision to cover the power of the Secretary to arrest and deport Chinese here in violation of the immigration laws only, are rested upon the assumed premise that section 43 of the immigration act, *supra*, forbids the broader construction of that decision. The cases holding that view are notably *Ex parte Woo Jan*, 228 Fed. 927 (opinion trial court in case at bar); *United States* v.

Prentis, 230 Fed. 935; *United States* v. *Lem Him*, 239 Fed. 1023, and *Lee Wong Hin* v. *Mayo*, 240 Fed. 368. The apparent defect in the reasoning of these decisions lies in the fact that the grounds relied upon would equally forbid the application to Chinese aliens of any of the provisions of the immigration laws. These decisions find no support even under the narrow view of the Wong You case.

There seems no escape from the conclusion that the principle which permits the immigration act to add new conditions to the entry and residence here of Chinese aliens must likewise permit that same act to add a new remedy for arresting and deporting Chinese here in violation of the Chinese-exclusion laws. If there be no amendment in the one case, certainly there can be none in the other.

If the Government's view requires further support it may be found in such cases as *United States* v. *Stevenson*, 215 U. S. 190, 197–99; *United States* v. *Chamberlin*, 219 U. S. 250, 258, and *Blacklock* v. *United States*, 208 U. S. 75, 86.

In the first of these cases the question involved was whether the remedy which the immigration law provided for recovering the penalty for unlawful importation of an alien contract laborer, forbade the Government from resorting to the ordinary remedy of recovering the penalty by indictment. This court held that both remedies were open.

In each of the other two cases, a choice of remedies under differing statutes was recognized.

Could it in any legal sense be asserted that in the above cases one statute "altered or amended" the other because it provided a different remedy which might also be adopted? The position of the appellee in the case at bar necessarily drives him to assert that it did, and thus the fallacy of his contention is at once exposed.

CONCLUSION.

It is respectfully submitted that the first question certified should be answered in the affirmative, and the second question in the negative.

WILLIAM C. FITTS,
Assistant Attorney General.

DECEMBER, 1917.

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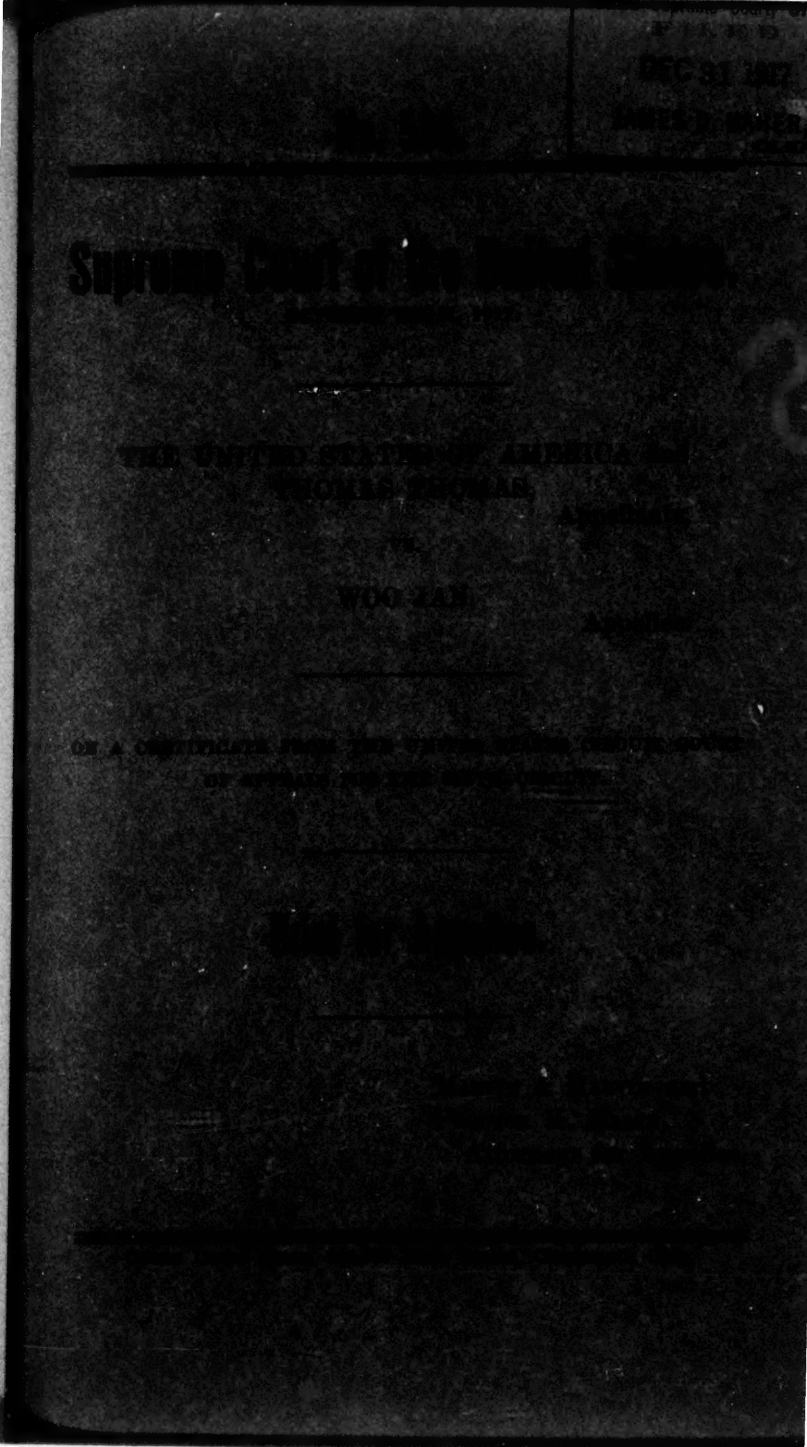

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CASES CITED.

Supreme Court of the United States.

THE UNITED STATES OF AMERICA and THOMAS THOMAS,

Appellants,

No. 586. *vs.*

WOO JAN,

Appellee.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Brief for Appellee.

STATEMENT.

The questions involved in this case are correctly stated in the brief for appellants. We desire, however, to set out more in detail the allegations of the petition which are taken as true on the demurrer herein.

The facts as stated in the petition are substantially as follows:

That appellee, Woo Jan, is 57 years of age and is a resident domiciled Chinese merchant in the United States; he first came to the United States in the year 1878 and has continuously resided therein, excepting for

three short periods, during which he was temporarily absent in China, having returned there upon temporary visits and with the previously announced intention in each instance of returning to his place of domicile in the United States. Although under the law not required to do so, he registered as a Chinese merchant at Lexington, Kentucky, in 1894, and has the certificate of registration in his possession. He has, since 1907, been a member of the firm of Yick Sang Tong, Chinese merchants in San Francisco, and during that time has owned a very substantial interest in the firm. This firm has done an annual business of thirty thousand ($30,000) dollars. For many years appellee has been engaged, likewise, in business as a merchant in the city of Ashland, Kentucky.

On January 29th, 1912, appellee applied to the office of the Chinese Inspector of the United States at San Francisco for a pre-investigation of his status as a domiciled resident Chinese merchant, intending to depart for China upon a temporary visit. Such pre-investigation of appellee's claimed status was made and prior to his departure a report, favorable to appellee's claim, was made by the Chinese Inspector and a returning merchant's certificate was issued to him, the presentation of which, upon his return to the United States, would entitle him to re-admission without further examination. Upon receipt of such returning merchant's certificate, appellee, relying thereon, departed from the Port of San Francisco, in March, 1912, upon a temporary visit to China. Upon May 2, 1913, he returned from China, landing at the Port of San Francisco (being the port from which he had departed), presented his returning merchant's certificate, submitted to inspection and examination, and in all respects complied with the Immi-

gration laws and was permitted to enter the United States. He immediately resumed his business as a Chinese merchant and has continued in such business ever since.

On April 1st, 1914, almost a year after his re-entry into the United States, appellee was arrested upon a warrant issued by the Secretary of Labor (copy of which was attached to the petition) upon the ground that he is in the United States unlawfully, in that he was found therein in violation of the Chinese Exclusion Laws, and is, therefore, subject to deportation under the provisions of Section 21 of the Immigration Act.

Appellee charged that the provisions of the Immigration Act of February 20, 1907, as amended, had no application to his case and that any proceeding thereunder with a view to deporting him was without authority of law and void.

Appellee contends that the warrant shows upon its face that he is being detained without authority of law in that it affirmatively appears therefrom that the detention is for the purpose of an inquiry by the Secretary of Labor through the Inspectors of Immigration, as to whether appellee is liable to deportation under the Chinese Exclusion Laws. The authority of the Secretary of Labor to make such inquiry and to determine the question of appellee's deportability under the Exclusion Law is challenged. Appellee contends that his right to remain in the United States, if questioned, so far as the Chinese Exclusion Law is concerned, has been expressly committed by Congress to the Judicial Department, and that questions arising under the Exclusion Law, and not under the Immigration Act, must be passed upon by the Judicial Department and can not lawfully be tried or determined by the Executive Department, and for that

reason the appellee was unlawfully in custody and entitled to be discharged. His discharge having been ordered by the District Court, appeal was taken to the United States Circuit Court of Appeals and that Court has certified to this court the questions as set out in appellant's brief.

ARGUMENT.

Authority to issue the warrant in question is claimed under Section 21 of the Immigration Act, which is as follows:

> "In case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United States, he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came, as provided by Section 20 of this Act."

An examination of other sections of the Immigration Act determines when aliens are subject to deportation under the provisions of that Act.

Section 2 of the Immigration Act enumerates the classes of aliens who are to be excluded from admission into the United States, such as idiots, lunatics, paupers, prostitutes, etc.

Also, an alien may be deported within three years by the Secretary of Labor where his entry into the United States has been unlawful, as provided by Section 36 of the Act, which reads:

> "All aliens who shall enter the United States except at the seaports thereof, or at such place

> or places as the Secretary of Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by Sections 20 and 21 of this Act."

Section 3 of the Immigration Act provides, without time limitation, for the deportation of any alien who, subsequent to entry into the United States, engages in the unlawful occupations therein described.

All of these sections apply equally to aliens of all nationalities. For any of the causes so enumerated, aliens of all classes may be excluded or deported.

None of the causes so set out exist or is charged to exist in this case. It is not charged in the warrant that appellee comes within any of the classes enumerated by Section 2 which shall be excluded; nor is it charged in the warrant that he entered unlawfully or fraudulently; nor is it charged in the warrant that he has engaged in any of the unlawful occupations condemned by Section 3 of the Act. Therefore, it is not sought to deport appellee because he is subject to deportation under the provisions of the Immigration Act. The authority to deport him can only be claimed by virtue of the provisions of Section 21, above quoted, authorizing the deportation of an alien who is here in violation of any law of the United States. If there were no limitation in the Immigration Act upon the authority conferred by Section 21, we would have to concede that that Act authorized the arrest and deportation of appellee, but the sole charge against the appellee is that he is found in the United States in violation of the Chinese Exclusion Law, and Section 43 of the Immigration Act contains the following proviso:

> "This Act shall not be construed to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent."

Existing laws relating to immigration or exclusion of Chinese persons or persons of Chinese descent provided the manner in which they should be deported, to-wit: Section 3 of the Act of September 13, 1888 (25 Stat., pp. 476, 477), being entitled "An Act to Prohibit the coming of Chinese laborers to the United States, provides:

> "That any Chinese person, or person of Chinese descent, found unlawfully in the United States or its territories may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge or commissioner of any United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came.
>
> "But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district."

Section 3 of the Act of March 3, 1901 (31 Stat., p. 1093), provides:

> "That no warrant of arrest for violation of the Chinese Exclusion Laws shall be issued by the United States Commissioners except upon the sworn complaint of a United States District Attorney, Assistant United States District Attorney, Collector, or Inspector of Customs, Immigration Inspector, United States Marshal, or

> Deputy United States Marshal, or Chinese Inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States District Attorney of the District in which issued."

These sections provide the manner in which a Chinaman may be taken into custody for deportation under the Chinese Exclusion Laws. Only Chinese laborers are liable to deportation under the provisions of this law.

By Article I of a treaty between China and the United States, entered into November 17, 1880, it was provided:

> "Whenever in the opinion of the Government of the United States the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may be going to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse."

Article II of the treaty provided that:

> "Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who

> are now in the United States, shall be allowed to go and come at their own free will and accord and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

By the Act of May 6, 1882, as amended and added to by the Act of July 6, 1884 (22 Stat., p. 58; 23 Stat., p. 115), it was provided that:

> "From and after the passage of this act, and until the expiration of ten years next after the passing of this act, the coming of Chinese laborers to the United States be and the same is hereby suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come to remain within the United States."

By the Act of April 29, 1902, as amended and re-enacted by Section 5 of the Deficiency Act of April 27, 1904 (32 Stat., Par. 1, p. 176; 33 Stat., pp. 339-428), "all laws regulating, suspending or prohibiting the coming of Chinese persons, or persons of Chinese descent, into the United States are re-enacted, extended and continued without modification, limitation or condition."

From the foregoing, it is plainly apparent that Chinese laborers only are liable to deportation under the provisions of the Chinese Exclusion Law.

The appellee is admittedly a Chinese merchant. He complied with the requirements of the Immigration Act and is not liable to exclusion or deportation thereunder. He is not charged with having violated any of the provisions of that Act by his entry. Being charged with being in this country in violation of the Chinese Exclusion

Laws, his status as a merchant must be disputed, and that question can only be determined as provided in the Exclusion Laws. If it be held that his status as a merchant may be ascertained and his liability to deportation determined by the summary proceeding provided for by the Immigration Act, that Act would be given an effect which materially alters and amends the Chinese Exclusion Law, which is expressly prohibited by the provisions of the Immigration Act itself.

As already pointed out, the procedure for the enforcement of the provisions of the Immigration Act and that for the enforcement of the provisions of the Exclusion Law are radically different. In the one case a departmental hearing only is provided, and in the other a judicial hearing. If the petitioner may be held upon the warrant herein to a hearing before the departmental officers, for the purpose of determining whether he is in the United States in violation of the Exclusion Law, the force and effect and the spirit of the provisions of the Exclusion Law herein quoted, giving the Chinaman a right to a judicial hearing and requiring that before he shall be deported a judicial officer shall be satisfied that he has no right to remain in the United States, and a judge of the district court upon appeal shall be so satisfied before ordering his deportation, and requiring that the proceedings against him shall be instituted only upon a sworn complaint charging a violation of the Exclusion Law are absolutely nullified, and a departmental procedure, arbitrary and exclusive in its character, unrelated to a judicial proceeding and unfettered in the scope of its inquiry or the extent of its findings, or the competency of the evidence upon which such findings are based, wholly free from the application of the rules of evidence ordinarily applied in law suits, is substituted therefor.

This, we contend, would be an amendment, alteration and a practical repeal of the provisions of the Chinese Exclusion Laws, and such construction would be violative of the provisions of Section 43 of that Act which expressly saves the Chinese Exclusion Law from repeal, alteration, or amendment.

If the procedure attempted to be followed by the departmental officers in appellee's case be permissible, is not the effect exactly the same as if to the Exclusion Law were added an amendment or proviso conferring upon the Immigration Department the right to inquire into and finally determine questions arising exclusively under the Chinese Exclusion Law for a period of three years after the facts upon which such question arises occurred, and thus to substitute an entirely different method of procedure for the one now given by the Exclusion Law, which is applicable to the facts showing a violation of such law without any time limitation whatever?

The words contained in Section 21, "or of any law of the United States" are inserted undoubtedly with a view of providing for cases which may arise under any law of the United States applying to aliens other than Chinese which may be passed at any time. To hold that the language used has any application to proceedings under the Chinese Exclusion Law is to nullify absolutely the language of Section 43, that the Immigration Act shall not be construed "to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons, or persons of Chinese descent." The various sections of the law are to be harmonized, if possible. To adopt the construction which the Government contends for is to make nugatory the provisions of Section 43.

Appellants insist, however, that this question has been decided adversely to appellee's contention by this court

in the case of *United States* v. *Wong You*, 223 U. S., 67, and quotes from that opinion in support of that contention. We do not so construe that opinion, nor was it so construed by the District Judge in his very learned opinion in this case.

We insist that the proper construction of this opinion was made in the opinion of the District Court (228 Fed., 927), as follows:

> "So that what we have according to the construction of Section 21 contended for is Congress amending those laws (Chinese Exclusion Laws), by adding thereto another process for deporting Chinese laborers, whom they alone make deportable, and at the same time providing that what it is doing shall not amend them. This presents us with two ideas. One is that the Immigration Department is thereby empowered to deport Chinese laborers and the other that no provision of the act adds to the Chinese Exclusion Laws. These two ideas are inconsistent. They can not stand together. One or the other must give way and it is the former one which must do this.
>
> "The decision of the Supreme Court in the case of *United States* v. *Wong You*, *supra*, is not against giving such effect to this provision of Section 43. In that case a Chinese laborer had entered this country from Canada surreptitiously and not at a proper place of entry and the question was whether he was deportable under the Act of February 20, 1907, by the Immigration Department, notwithstanding he was also deportable as a Chinese laborer under the Chinese Exclusion Laws by the Judicial Department. It was held that he was, reversing the decision of the Circuit Court of Appeals for the Second Circuit which held to the contrary. The position of the lower court was that that

was a case for the application of this rule, to-wit:

"'A later general statute which in its most comprehensive sense would include that which is embraced in an earlier particular enactment, does not, as a general rule, repeal the latter, but applies only to such cases within its general language as are not within the provision of the particular act.'

"And it was thought that this was a case especially for the application of the rule, because the immigration act expressly provides that it shall not be construed as repealing, altering or amending the existing laws relating to the exclusion of Chinese persons.

"But that was not a case for the application of the rule referred to because it did not come within it. The later general statute did not include that which was embraced in the earlier particular enactment. The Chinese Exclusion Laws embraced Chinese laborers alone. The act of February 20, 1907, did not include Chinese laborers as such at all. It included the undesirable aliens designated therein and those entering at improper places of entry. Because such an alien might also be a Chinese laborer it could not be said that the act included Chinese laborers as such. And, it was only in case it included them as such would it have been true that both covered the same territory. The question presented then was simply this. Because a Chinese laborer was deportable by the Judicial Department under the Chinese Exclusion Laws on the ground that he was a laborer was that any reason why he should not be also deportable by the Immigration Department under the act of February 20, 1907, on the ground that his presence here was in violation thereof in that he came within the list of undesirables

thereby made or had entered at an improper place of entry, if such were the case, that act exempting no aliens whatever from its provisions. In justifying the negative answer which the Supreme Court gave to this question Mr. Justice Holmes said:

"'By the language of the act any alien that enters the country unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. It seems to us unwarranted to exclude the Chinese from this liability because there is an earlier, more cumbrous proceeding which this partially overlaps. The existence of the earlier laws only indicates the special solicitude of the government to limit the entrance of Chinese. It is the very reverse of a reason for denying to the government a better remedy against them alone of all the world, now that one has been created in general terms.'

"As to the bearing of Section 43 on the question, he said:

"'To allow the immigration act its literal effect does not repeal, alter or amend the laws relating to the Chinese, as it provided that it shall not in Section 43.'

"Does it follow then from the fact that the Act of February 20, 1907, does not alter or amend the Chinese Exclusion Laws, in that it provides for the exclusion and deportation by the Immigration Department of all aliens alike without regard to their specific alienage, if they come within the list of undesirables, thereby prescribed, or enter at an improper place of entry, thus including Chinese aliens and such of them as may be laborers, it does not alter or amend them if it provides that Chinese laborers, who are excludable and deportable only under those laws, shall be deportable within the three year

> period by the Immigration as well as by the Judicial Department? I think not and it seems to me that the question answers itself. The latter provision is a pure addition to and hence an amendment and alteration of the Chinese Exclusion Laws. It is nothing else than such an addition. It has no other scope. This is not true of the other provisions of the Act of February 20, 1907, which cover all aliens alike without regard to their specific alienage. It would be incorrect to entitle an act embracing them, 'An Act to amend the Chinese Exclusion Laws.' Besides, as we have seen, before the acts of March 3, 1903, and February 20, 1907, with their sections 36 and 43, the line of legislation as to immigration of aliens to which they belong, with the exception of the subordinate acts of March 3, 1893, from its very beginning in the Act of March 3, 1875, embraced Chinese aliens. Those acts made no change in this particular save as to the provisions of the subordinate act of March 3, 1893, which they embraced within them. In including Chinese aliens within their scope, therefore, they made no departure from the line of legislation to which they belong as it existed previously. And as it so existed it was separate and distinct from the Chinese Exclusion Laws. A continuation of this feature then in those acts could not properly be viewed as having any relation to those laws by way of amendment or alteration."

It has not been claimed that the Immigration Act does not apply to Chinese. Indeed, we insist that a Chinaman who is in the United States and who belongs to one of the classes prohibited by that Act, or who has entered surreptiously, as provided by that Act, is liable to deportation under that Act, whether he be a Chinese merchant

or a Chinese laborer, and that the fact that he is a Chinese merchant does not preclude him from prosecution or from deportation in accordance with the provisions of that Act. We do insist, however, that unless the Chinaman is charged with being in this country in violation of that act and where the sole charge against him is that he is here in violation of the Chinese Exclusion Laws (which can only involve his status as a merchant) that, because of Section 43 of the Immigration Act, he is not subject to deportation under the terms of the Immigration Act but has a right to a judicial hearing and determination of his status, as provided by the Exclusion Law.

It is true that there are a number of cases wherein the courts have taken the position contrary to that urged for appellee and those cases are cited by appellants in their brief, but an examination of the opinion in those cases discloses that either the questions involved were not fully developed or considered, or that they were based upon the assumption that this court had decided the question in the case of *United States* v. *Wong You*, 223 U. S., 67, adverse to the contention here made by appellee.

In the case of *Ex Parte Lam Pui*, 217 Fed., 456, it was conceded that the language of Section 21 of the Immigration Act conferred upon the Secretary of Commerce and Labor the power upon being satisfied that petitioner was subject to deportation under any law of the United States, including the Chinese Exclusion Laws.

Therefore, the question presented here was not fairly presented to the court for determination, nor did the court undertake to determine same for the petitioner was ordered discharged upon the ground that sufficient proof had not been offered to satisfy the court that the petitioner was unlawfully in the United States.

In the case of *Ex Parte Woo Shing,* 226 Fed., 141, decided by Mr. Justice Clark of this Court, then sitting as United States District Judge, the opinion in the case of *United States* v. *Wong You, supra,* was construed as being decisive of the question.

Also in the cases of

Sibray v. *United States,* 227 Fed., 1, 5.
Lo Pong v. *Dunn,* 235 Fed., 510.

In the case of *Lui Hip Chin* v. *Plummer,* 238 Fed., 763, the court found that there was no evidence upon which, as a matter of law, deportation could be based and ordered the discharge of the petitioner.

The first case, holding that the Immigration Commissioner did not have the jurisdiction to issue a warrant for and deport a Chinaman where the sole charge was that he was here in violation of the Chinese Exclusion Law is the opinion in *Ex Parte Woo Jan,* 228 Fed., 927. (Opinion Trial Court in case at bar.)

This opinion was followed by the District Court in the case of *United States, ex rel Lem Him,* v. *Prentis et al,* 239 Fed., 1023, in which the court said:

> "It will be noted in the Wong You case that the Chinaman there violated a general law applying to all aliens alike, and it was held that the law applied to him, notwithstanding there was another law which applied to Chinamen in particular.
>
> "In the instant case the only delinquency of the Chinaman was a violation of the Chinese Exclusion Laws, and not of the alien law in general. So that, in my opinion, Section 21 of the Act of February 20, 1907, must mean that the Secretary of Commerce and Labor may order the deportation of an alien who violates the pro-

visions of that act, or of any law of the United States, except the Chinese Exclusion Law, because Section 43 expressly negatives the thought that the Chinese Exclusion Law has been repealed. It follows, therefore, that the petitioner could not be ordered deported without a judicial proceeding, as provided for in the Chinese Exclusion Act.

"With due deference to the eminent authorities to the contrary, I agree with the learned opinion of Judge Cochran, announced in *Ex Parte Woo Jan, supra.*"

The opinion in this case was affirmed by the Circuit Court of Appeals, Seventh Circuit, in a *per curiam* opinion in the following language:

"We approve and adopt the opinion of the District Court reported in 230 Fed., 935, under the title *U. S.* v. *Prentis*, 239 Fed., 1023.

The Circuit Court of Appeals, Fifth Circuit, approved this opinion in the case of *Lee Wong Hin* v. *Mayo*, 240 Fed., 368, and said:

"It is settled that the Immigration Act of February 20, 1907, makes no exception from the classes of undesirable aliens covered by it of Chinese persons, and that persons of whatever race, who enter this country in violation of its provisions, subject themselves to deportation by the method provided for in Sections 20 and 21 of the act, after an administrative hearing only. *United States* v. *Wong You*, 223 U. S., 67. The question presented in this case is a different one. The appellant is charged with no violation of the Immigration Act, as was Wong You in the case cited. He is charged with a violation of the Chinese Exclusion Act only, and the government's contention is that the

plain language of Section 21 of the Immigration Act makes the procedure provided for in that act applicable to any alien 'subject to deportation under the provisions of this act or of any law of the United States,' and that the appellant, being subject to deportation under the Chinese Exclusion Act, which is a law of the United States, may therefore be deported under the procedure provided in the Immigration Act."

And the court, after quoting Section 43 of the Immigration Act, says:

"This Section prohibits a construction of the Immigration Act that would have the effect of repealing, altering, or amending existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent. Section 21 of the Act ought, therefore, not to be given a construction that would operate to repeal, alter or amend any part of the Chinese Exclusion Laws, in force when the Immigration Act was enacted. * * *

"If Sections 20 and 21 of the Immigration Act be construed to provide a method of deportation available to the government as against violators of the Chinese Exclusion Act alone, then such persons are, by such a construction of the Immigration Act, deprived of the right to a judicial hearing to determine their right to remain in this country, which they theretofore had under the Chinese Exclusion Act. That such a construction would accomplish an alteration or amendment of the Chinese Exclusion Act in a material respect is obvious. It would, at the option of the government, make the Chinese person's right to stay in this country depend upon an executive determination of his status, instead of upon the result of the judicial in-

quiry accorded to him by the Exclusion Act. That this was a valuable right to the Chinese person goes without saying. The effect of such a construction, so far as concerns the government, may be, as contended by it, merely to provide a cumulative, distinct, and independent remedy to that provided by the Exclusion Act. From the point of view of the Chinese person, however, the effect of the construction would be to deny him, at the option of the government, his remedy under the Exclusion Act of a judicial inquiry into his right to remain in this country, and to substitute therefor a mere executive determination of the department.

"We think to adopt such a construction would be to ignore the direction of Section 43 of the Immigration Act that 'this act shall not be construed to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons, or persons of Chinese descent.' Refusing to adopt the construction contended for by the government, it may be difficult to find a field of operation for the words 'or any law of the United States,' found in Section 21 of the Immigration Act, unless they be held to relate to future legislation. In any event they should not be given a function as referring to the Exclusion Act, when the doing so brings the court in direct conflict with the proviso of Section 43. The effect of the proviso of Section 43 is to except from the operation of the general words of the preceding Section 21 'or any law of the United States' the Chinese Exclusion Act."

We do not understand that if our contention be adopted that it forbids the application of Chinese aliens of any of the provisions of the Immigration Law. We think that for any of the causes named in the Immigration Laws a Chinaman may be deported in the manner

set out in the Immigration Laws; that for the cause of deportation stated in the Chinese Exclusion Law he shall be deported in the manner provided in the Exclusion Law. The Chinese Exclusion Law forbids the coming and remaining in the United States of Chinese laborers. It provides the manner in which Chinese laborers may be deported. The provision of the Immigration Act that aliens (including Chinese) who are idiots, lunatics, paupers, prostitutes, etc., shall be deported and the manner in which they are deported is not an amendment or alteration of the Chinese Exclusion Law. It in no wise affects the right of a Chinese merchant or laborer, as such, or the manner in which his status as a Chinese merchant or laborer may be determined.

As stated in the case of *Lee Wong Hin* v. *Mayo, supra*, the right of a Chinese person to have his status determined by judicial inquiry is a valuable right and of which he should not be deprived unless it be clearly expressed.

The right of a Chinese merchant to be and remain in this country is guaranteed by the obligations of the treaty between China and the United States. It is recognized by the statutes passed pursuant to that Treaty. The method of determining that status was fixed by those statutes. Congress elected to say that a Chinese person's status should be a matter of judicial investigation and determination. That method of procedure should not be set aside and the power vested in the administrative department to proceed in a summary way to deport a Chinese person unless that power has been conferred by Congress in clear and unmistakable terms.

The only question involved in the charge against appellee is whether or not he belongs to the class which the treaties had said might be excluded and which the statutes said should be excluded. He insists that he is en-

titled to have a judicial determination of this question, as provided in the Chinese Exclusion Law.

CONCLUSION.

We respectfully submit that the first question certified should be answered in the negative and the second question in the affirmative.

MARVIN & MARVIN and
PROCTOR K. MALIN,
Attorneys for Appellee.

December, 1917.

Francis R. Marvin
of counsel.

UNITED STATES ET AL. *v.* WOO JAN.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 586. Argued January 17, 1918.—Decided January 28, 1918.

Section 21 of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898, empowers the Secretary of Labor, when satisfied that an alien has been found in the United States in violation of that act, or is subject to deportation under the provisions of that act or of any law of the United States, to cause such alien within the period of three years, etc., to be taken into custody and returned to the country whence he came; § 43, however, provides that the act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent. *Held*, that § 43 preserves the judicial proceedings prescribed by the Chinese Exclusion acts for the cases to which those acts apply, and that, where the ground was a violation of the Exclusion Acts and not a violation of the Immigration Act, the summary administrative method provided by § 21 cannot be used. *United States* v. *Wong You*, 223 U. S. 67, distinguished.

THE case is stated in the opinion.

Mr. Assistant Attorney General Fitts for the United States *et al.*

Mr. Francis R. Marvin and *Mr. Proctor K. Malin* for Woo Jan, submitted.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The Immigration Act of February 20, 1907, 34 Stat. 898, provides as follows:

"Sec. 21. That in case the Secretary of [Commerce

and] Labor shall be satisfied that an alien has been found in the United States in *violation* of this Act, or that an alien is subject to deportation under the provisions of this Act *or of any law of the United States* [italics ours], he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came. . . ."

It is provided, however (§ 43), "That this Act shall not be construed to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent. . . ."

The relation of these sections has given rise to diversity of decision, district courts of different districts and circuit courts of appeals for different circuits being in opposition. *Ex parte Woo Shing* (N. D. Ohio), 226 Fed. Rep. 141, sustains the power of the Secretary of Labor exercised under § 21, and the decision was approved by the Circuit Court of Appeals for the Eighth Circuit (*Lo Pong* v. *Dunn*, 235 Fed. Rep. 510; *Sibray* v. *United States*, 227 Fed. Rep. 1). The power of the Secretary was denied in the instant case by the District Court for the Eastern District of Kentucky (228 Fed. Rep. 927), and the decision has been followed by the Circuit Courts of Appeals for the Seventh and Fifth Circuits. *United States* v. *Lem Him*, 239 Fed. Rep. 1023; *Lee Wong Hin* v. *Mayo*, 240 Fed. Rep. 368.

The Circuit Court of Appeals, reciting this diversity, certifies to this court the following questions, "(*a* in the abstract, *b* concretely)":

"(*a*) Has the Secretary of Labor, acting within three years from the last entry, jurisdiction to arrest and deport a Chinese alien upon the sole ground that he is found in this country in violation of the Chinese exclusion act?

"(*b*) Are the facts stated in Woo Jan's petition and admitted by demurrer inconsistent with any jurisdiction in the Department of Labor to cause his arrest and deportation?"

The answer that is received to "(*a*)" determines the answer to "(*b*)." In other words, if the first be answered "No," the second will necessarily be answered "Yes," the second being, as indicated by the Circuit Court of Appeals, the concrete application of the abstraction of the first.

The facts are these: The Secretary of Labor, attempting to exercise the power supposed to be conferred upon him by § 21, caused the arrest of Woo Jan as a Chinese alien unlawfully within the United States with the view and purpose of deporting him. The warrant of arrest recited "that the said alien is unlawfully within the United States in that he is found therein in violation of the Chinese Exclusion laws, and is, therefore, subject to deportation under the provisions of section 21" of the Act of Congress of February 20, 1907, amended by the Act of March 26, 1910, 36 Stat. 263. It was directed to the "Inspector in Charge, Cleveland, Ohio, or to any immigrant inspector in the service of the United States."

Woo Jan petitioned the District Court in *habeas corpus* to be discharged from the arrest, asserting his right to be and remain in the United States and setting up as grounds of it, that he was a merchant and that his status as a resident had been investigated by the authorities of the United States and established, and that there was no authority of law for the issue of the warrant. To the petition the District Attorney demurred, and the court, holding that the warrant had been issued without authority of law, ordered the discharge of Woo Jan. The case, therefore, presents to us through the questions certified the validity of the judgment.

We are admonished at the outset by the diversity of opinion that there are grounds for opposing contentions. Indeed, §§ 21 and 43 seem to be, at first impression, in irreconcilable conflict. The declaration of § 21 is that the power of the Secretary of Labor shall extend to taking into custody and returning to the country from whence

he came whoever is subject to deportation under the provisions "*of any law of the United States.*" The universality of the declaration would seem to preclude exception and compel a single judgment. But, passing on to § 43, we find another law preserved and kept in function, a function so firm and exclusive that it is provided that the act, of which § 21 is but a part, shall not be construed to "repeal, alter, or amend" it. Let us repeat the language—"*Provided*, That this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent." There is, therefore, an express qualification of the universality of § 21, indeed, from all of the provisions of the act the Chinese Exclusion laws are excepted. They, the latter, are to stand in their integrity and efficacy. But it is asserted that they are so left to stand and that § 21 only gives another remedy, and *United States* v. *Wong You*, 223 U. S. 67, is cited.

First as to the assertion, then as to the cited case. That we may estimate both we insert in the margin the provisions of the Exclusion laws.[1] The Government,

[1] The Act of May 6, 1882, as amended by the Act of July 5, 1884 (22 Stat. 58; 23 Stat. 115), provides that:

"From and after the passage of this act, and until the expiration of ten years next after the passing of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come to remain within the United States."

Section 13 of the Act of September 13, 1888, 25 Stat. 476, 479, entitled "An Act to prohibit the coming of Chinese laborers to the United States," provides:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United

confronted with those provisions, conceded at bar that the remedy of § 21 is not their equivalent. The difference is marked. It is the difference between administrative and judicial action; and the Government recognized that the difference—we might say contrast—is the step on which it "must fall down, or else o'erleap." And necessarily so. Manifestly the remedy of § 21 has not the safeguards of impartiality and providence that the remedy of the Exclusion laws has. Mere discretion prompts the first and last act of the former; the latter has the security of procedure and ultimate judgment of a judicial tribunal, where all action which precedes judgment is upon oath and has its assurance and sanctions.

The remedies are too essentially different to be concurrent. And yet we are asked to decide that the law which permits the first, that is, permits the deportation of an

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States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district."

Section 3 of the Act of March 3, 1901, 31 Stat. 1093, provides:

"That no warrant of arrest for violations of the Chinese-exclusion laws shall be issued by United States commissioners excepting upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector, deputy collector, or inspector of customs, immigration inspector, United States marshal, or deputy United States marshal, or Chinese inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States district attorney of the district in which issued."

By the Act of April 29, 1902, as amended and re-enacted by § 5 of the Deficiency Act of April 27, 1904 (32 Stat., Pt. 1, 176; 33 Stat. 394, 428), "all laws . . . regulating, suspending, or prohibiting the coming of Chinese persons or persons of Chinese descent into the United States, . . . are . . . re-enacted, extended, and continued, without modification, limitation, or condition."

alien simply upon the warrant or determination of an executive officer, is not an amendment or alteration of a law which prohibits it. And there can be no doubt of the result if such decision be made. The summary and direct remedy of § 21 will always be used. No Chinese person will be given the formal procedure of the Exclusion laws with their safeguards. The cases demonstrate this and we cannot believe that Congress was insensible of it and left it possible. Nor can we ascribe to Congress a deliberately deceptive obscurity and an intention, by the use of words which can be given a double sense, to grant a right that can have no assertion. We must, indeed, assume that § 43 was intended to be sufficient of itself—fully exclusive and controlling.

We might terminate the discussion here and leave the case to the explicit language of § 43 that § 21 (to pass at once to the particular) "shall not be construed to repeal, alter, or amend existing laws relation to the immigration or exclusion of Chinese persons." The Government, however, contends, as we have seen, that this court has decided to the contrary in *United States* v. *Wong You, supra.*

The Government's understanding of the case is erroneous. It concerned Chinese persons, but not the Exclusion laws, and it was decided that such persons might offend against the Immigration Act and be subject to deportation by the Department of Labor if they should so offend. This was the extent of the decision and its language was addressed to the contention that the latter act was applicable to all persons except Chinese because of § 43. The contention was declared to be untenable, and it was untenable. The case, therefore, is different from that at bar and the opinion was considerate of the difference, that is, considerate of the difference between the Immigration Act and the Exclusion laws.

This difference must be kept in mind. The Chinese Exclusion laws have not the character or purpose of the Im-

migration Act. They are addressed under treaty stipulations [1] to laborers only. Other classes are not included in their limitation and it was provided by the treaty that the limitation or suspension of the entry of laborers should be reasonable. The questions therefore which could arise were deemed different from any under the Immigration Act, and the Exclusion laws are adapted to them and their procedure is hence saved by § 43.

We, therefore, answer question "(*a*)" No, and question "(*b*)" Yes.

And it is so ordered.

MR. JUSTICE CLARKE took no part in the consideration and decision of this case.

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[1] Article I of the treaty [November 17, 1880, 22 Stat. 826] provides that whenever in the opinion of the United States the coming of Chinese laborers to the United States or their residence therein might affect the interests of the United States, it was agreed that the United States might regulate, limit or suspend such coming or residence, but not absolutely prohibit it, and that the limitation should be reasonable and apply only to laborers, other classes not being included in the limitation. Article II of the treaty is as follows:

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come at their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."